United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 2, 1998

TO : Richard L. Ahearn, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Waco Scaffolding 512-5006-5091
Case 9-CA-35164 512-5084-5067
524-8347

This case was submitted for advice as to whether the Employer unlawfully threatened an employee with discharge and/or discharged him because he refused to become a member of the Union.

FACTS

Waco Scaffolding ("Waco" or "Employer") erects and dismantles scaffolding for use in construction projects in the Columbus, Ohio area. In February 1996, Waco signed a letter of assent with the South Central District Council of the United Brotherhood of Carpenters and Joiners ("Carpenters") whereby it agreed to recognize the Carpenters as the exclusive bargaining representative of all its employees engaged, inter alia, in assembling, erecting, fastening and dismantling of scaffolding. The Section 8(f) agreement also includes a union-security clause which provides, in pertinent part, that all employees covered by the agreement must become and remain "members in good standing" of the Carpenters by their eighth day of employment. The contract does not otherwise define membership in good standing or set forth employees' obligations thereunder.

In about May 1996 Waco hired Austin Brown, Jr. to perform scaffolding work within the Carpenters' jurisdiction. Brown is a long-time member of Charging Party Laborers Local 423 ("Laborers"); he does not belong to the Carpenters Union. The Employer does not have an agreement with the Laborers.

In July 1997,[1] the Employer assigned Brown to a project located at Ohio State University's baseball field. In late June or early July Waco's branch manager Bush received a telephone call from Laborers business agent Murphy. Murphy told Bush that he knew that Waco employed a couple of members of the Laborers and that he should not be using Laborers without an agreement. Murphy suggested that Waco enter into a site agreement to use Laborers at an upcoming project at Ohio State's football stadium. Bush responded that he was not interested in contracting with the Laborers because the Employer already was signatory to the Carpenters agreement.

Bush then called Carpenters' business agent Moreno and advised him of the conversation with Murphy. Moreno claimed the scaffolding work on all of the Employer's projects and insisted that under their collective-bargaining agreement Waco could staff the site with Carpenters-represented employees only. Nonetheless, Moreno told Bush to tell the Laborers that if they would come and see him they could "join the Carpenters." Moreno repeated that Waco could not use any members of the Laborers unless they joined the Carpenters.

A day or two later, Bush told Waco field superintendent Meinke to inform Brown and two other Laborers that Waco could only use Carpenters on the stadium project. Bush instructed Meinke to lay the Laborers off for lack of work unless they agreed to sign up with the Carpenters.

Meinke went down to the Ohio State baseball diamond site on the morning of July 11 to speak to the Laborers. Meinke states that he told Brown that since Brown was not a Carpenter that we would have to lay him off unless he went down to Dicky Moreno [the Carpenters business agent] who would sign him up. Brown did not respond. As Brown picked up his final paycheck at the Employer's offices later that afternoon, Meinke again explained that he could keep his job, but only if he became a "member" of the Carpenters Union as an apprentice. Brown rejected the offer, assertedly because of the time I have in the Laborers Union, and two, because I don't want to take a cut in pay

[1] All dates are in 1997 unless specified otherwise.

to start in an apprenticeship program.[2] Brown understood that the apprentice wage rate under the Carpenters' contract was much lower than the Laborers' journeyman rate that he had been paid. [*FOIA Exemption 7(D)* ,] Brown explained that, I would not have accepted employment with the Company if I would have been required to take a pay cut regardless of whether I had to join the Carpenters' union.[3] Furthermore, Brown was unwilling to start over with the Carpenters' pension plan, since he had accrued a substantial number of hours under the Laborers' plan.

Waco laid Brown off for lack of work at the end of the day. Two other Laborers were similarly laid off upon their refusal to become members of the Carpenters Union.[4] During his period of employment, Waco paid Brown Laborers' scale, contributed to the Laborers' pension and health and welfare funds on Brown's behalf and deducted his Laborers' dues directly from his paycheck.

ACTION

We conclude that the Region should issue a Section 8(a)(1) complaint, absent settlement, against the Employer for threatening Brown with discharge if he refused to "sign up" as a "member" of the Carpenters. However, the Region should dismiss that aspect of the charge, absent

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[2] Brown had been a member of the Laborers for many years and had reached a relatively high rate of pay under their agreements, which the Employer apparently followed in some fashion.

[3] In fact, had he stayed with Waco it is unclear whether Brown would have received the Carpenter's journeyman or apprentice rate. Nonetheless, Meinke only gave Brown the option of continuing as an apprentice, an offer which Brown clearly rejected. Under those terms, Brown's hourly rate would have dropped from $15.77 as a journeyman Laborer to approximately $9.75 as an apprentice Carpenter.

[4] One of the other two laid-off Laborers subsequently joined the Carpenters and was rehired. The instant charge specifically concerns Brown only.

withdrawal, alleging that the Employer unlawfully discharged Brown, in light of his refusal to accept a lawfully imposed cut in pay and benefits.

It is well settled that an employer violates Section 8(a)(1) if it threatens to discharge an employee for failing to obey some additional union-security obligation, apart from payment of membership dues and initiation fees.[5] Thus, an employer may not lawfully notify an employee that he or she is required to become a member of a union, if it thereby indicates -- directly or indirectly -- that something more than the payment of regular dues and fees is required to comply with a contractual union-security clause.[6] This is a violation even if the collective-bargaining agreement requires only the payment of agency fees and the employee had access to that agreement.[7]

However, an employer that seeks to discharge an employee for failure to comply with the contractual dues obligations of union membership does not violate the Act.[8] And, where an employer informs an employee that he or she must become a "member," and neither the statement itself nor its context suggests that what is being required is something other than the payment of regular dues and the initiation fee, there is no violation.[9] Thus, as the

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[5] Union Starch & Refining Co., 87 NLRB 779 (1949), enf'd 186 F.2d 1008 (7th Cir. 1951); Hershey Foods Corp., 207 NLRB 897 (1973), enf'd 513 F.2d 1083 (9th Cir. 1975).

[6] See United Stanford Employees, Local 680 (Leland Stanford Junior University), 232 NLRB 326, n.1, 328-29, 333 (1977) (new employees were told that they had to become members of the union and that "membership" included the signing of a membership card and the taking of a membership oath, in addition to the payment of fees and dues).

[7] Id. at 329.

[8] NLRB v. General Motors Corp., 373 U.S. 734 (1963).

[9] See I.B.I. Security, 292 NLRB 648, 649, 655-56 (1989) (employer lawfully discharged employee who unreasonably resisted compliance with union security obligation to become "member" despite union's failure to provide employee

Supreme Court stated in NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963):

> It is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. "Membership" as a condition of employment is whittled down to its financial core.

In the instant case, we conclude that the Employer violated Section 8(a)(1) by threatening to terminate Brown because he refused to comply with the Employer's unlawful demands that he become a "member" of or "sign up" with the Carpenters because those demands and their context would reasonably have suggested to Brown that what was being required was something other than the payment of regular dues and initiation fees. During the first meeting on the morning of his layoff, Meinke explained to Brown that he could not keep his job unless he signed up with the Carpenters. Meinke clearly implied that full union membership was required by stating that the Employer would have to lay him off since Brown was not a Carpenter. Meinke reinforced this impression when he stated later that day that Brown could keep his job only if he became a "member" of the Carpenters Union. At no time did Meinke, Bush or any other Employer official indicate to Brown that he could satisfy his union-security obligations without joining the Carpenters as a full member and could instead simply pay periodic dues and the initiation fee. Therefore, we conclude that in the context of Meinke's statements Brown would reasonably believe that there were no alternatives to full Union membership. Accordingly, the Region should allege a Section 8(a)(1) violation insofar as the Employer threatened to discharge Brown expressly

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with specific time period within which to pay initiation fee). The Board in I.B.I. upheld, without discussion, the ALJ's finding that the statements that the employee must become a "member" did not themselves violate the Act. This is consistent with Leland Stanford, supra, in that the statements in I.B.I. would not reasonably have been understood to require anything more than the payment of union dues and initiation fees.

because he refused to become a "member" or sign up with the Union.

However, we further conclude that it would not effectuate the purposes and policies of the Act to issue a Section 8(a)(3) complaint alleging that the Employer unlawfully discharged Brown. As set forth above, the Employer conditioned further employment on Brown's willingness to sign up with the Carpenters Union. However, even if this unlawful condition had not been made, Brown clearly rejected the lawful terms under which he would have worked, specifically a cut in pay and benefits as an apprentice under the Carpenters' contract as Meinke suggested, and a perceived loss in pension benefits through accruing Carpenters' pension credits rather than continuing to accrue Laborers' pension credits. Since Brown specifically acknowledged that he would not have worked under the terms of the Carpenters contract -- regardless of his status as full member, financial core member or non-member -- we conclude that it would not effectuate the Act to proceed further on his resulting discharge.[10]

Accordingly, the Region should issue a Section 8(a)(1) complaint against the Employer for threatening Brown with discharge if he refused to sign up as a "member" of the Carpenters Union. However, the Region should dismiss that aspect of the charge, absent withdrawal, alleging that the Employer unlawfully discharged Brown, in light of his refusal to accept a lawfully imposed cut in pay and benefits.[11]

B.J.K.

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[10] Compare Great Lakes District, Seafarers' International Union (Tomlinson Fleet Corp.), 149 NLRB 1114, 1118-21 (1964) (union did not unlawfully demand employee's discharge, despite improper accounting of dues arrearage, where employee "resolved not to pay any part of his dues").

[11] Insofar as the facial validity of the Carpenters agreement's union-security clause was never raised, we need not resolve the legality of that clause herein.